

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|  |   |                      |
|--|---|----------------------|
| <b>FELICIA M. RYDER</b>  | ) |                      |
| Claimant   | ) |                      |
| VS.  | ) |                      |
|  | ) |                      |
| <b>WHEATLANDS HEALTH CARE CENTER</b>                                 | ) |                      |
| Respondent   | ) | Docket No. 1,043,403 |
| AND  | ) |                      |
|  | ) |                      |
| <b>KANSAS ASSOCIATION OF HOMES<br/>FOR THE AGING INSURANCE GROUP</b> | ) |                      |
| Insurance Carrier  | ) |                      |

**ORDER**

Claimant appealed the May 6, 2013, Review and Modification award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on August 23, 2013, in Wichita, Kansas.

**APPEARANCES**

Jonathan Voegeli of Wichita, Kansas, appeared for claimant. Michael L. Entz of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Review and Modification award.

**ISSUES**

Claimant injured her right shoulder, cervical spine and lumbar spine on September 9, 2008. The parties settled this claim in March 2010 with an award of disability benefits based upon claimant's whole body functional impairment of approximately 14%. In August 2012, claimant filed an application for review and modification asserting a work disability, as she was no longer employed by respondent. ALJ Clark denied claimant's request for modification of her award, finding that claimant voluntarily quit her job and was capable of earning the same or higher wages than she did at the time of her accident.

Claimant points to *Bergstrom*<sup>1</sup> and *Serratos*<sup>2</sup> and maintains: “[T]he ‘abilities test’ relied upon by ALJ Clark and the asserted inapplicability of K.S.A. 44-510e(a) were both in error. Claimant respectfully requests the decision of ALJ Clark be overturned and Claimant be awarded a work disability . . . .”<sup>3</sup> Claimant contends she is entitled to a modification of her award based upon an 80.5% work disability.

Respondent asserts the ALJ must first find that review and modification is appropriate under K.S.A. 44-528 before deciding whether additional benefits are due under K.S.A. 44-510e(a) and that review and modification is subject to judicial discretion. Respondent maintains the *Serratos* case is irrelevant to the issues before the Board. Respondent also argues that assuming an injured worker who has been provided an accommodated position can quit his or her job and collect additional benefits for the resulting wage loss, claimant’s evidence lacks credibility. Respondent submits ALJ Clark properly denied claimant’s request to modify her award.

The issue before the Board on this appeal is: what is the proper application of K.S.A. 44-528 and K.S.A. 44-510e to a review and modification proceeding?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties’ arguments, the Board finds:

On March 26, 2010, claimant settled her claim against respondent for right shoulder, cervical and lumbar spine injuries. All issues were left open. After claimant returned to work, she was provided accommodated work by respondent as an activity director. At the time of her accident, claimant was a CNA.

Sharon L. Rinke, administrator for respondent, testified that claimant’s permanent restrictions were accommodated by employing her as the activity director in the dementia wing. Claimant’s duties required her to keep residents busy throughout the day.

Two weeks prior to July 1, 2011, claimant gave a note to Ms. Rinke indicating a desire to resign the position of activity director. The note indicated claimant wanted to work a maximum of 2 to 3 shifts per week in activities. According to Ms. Rinke, claimant’s mother was ill and claimant wanted to work fewer hours. On July 10, 2011, claimant’s brother was killed and claimant took a leave of absence until August 2, 2011. When

---

<sup>1</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>2</sup> *Serratos v. Cessna Aircraft Company*, No. 104,106, 2011 WL 2637449 (Kansas Court of Appeals unpublished opinion filed July 1, 2011).

<sup>3</sup> Claimant’s Brief at 3 (filed July 11, 2013).

claimant returned to work, Ms. Rinke moved claimant to the main dining room where there were more residents and more staff, making it easier for claimant to take time off work, if necessary. Claimant performed that job until she resigned on August 24, 2011. Ms. Rinke testified she was told by claimant that she was not getting any help with her mother and was resigning. According to Ms. Rinke, claimant never voiced any dissatisfaction with her job in the main dining room or complained about the physical requirements of that job.

Claimant indicated she was being required by the administrator to move to a position in the front dining room because respondent needed a CNA who also did activities. While working in the front dining room, claimant stayed mostly in the dining room calming down residents who were trying to get up, but were not supposed to. She would also ask residents if they wanted to participate in activities and then take them to the dining room in a wheelchair. Claimant would also straighten residents' rooms. Claimant testified she quit her job because she could not do the job the administrator wanted her to do. Claimant indicated that she resigned because she could not do the CNA work associated with her position in the main dining room. Since her resignation, claimant has not been employed, but occasionally does house cleaning, without pay, for her father.

At the request of her attorney, claimant was evaluated by vocational rehabilitation consultant Karen Crist Terrill. Ms. Terrill was aware that claimant worked for respondent after her 2008 accident, but did not testify to any detail about claimant's job duties during that time. Ms. Terrill did not know why claimant left her employment with respondent. Ms. Terrill identified 36 non-duplicative tasks performed by claimant in the 15 years prior to her 2008 accident. In March 2009, Dr. George G. Fluter gave claimant temporary restrictions for her 2008 injury. Claimant was seen again by Dr. Fluter on October 2, 2012, and with the exception of dropping the restriction of engaging in activities more than 24 inches away from the body using the right hand, made the restrictions permanent. He opined claimant could not perform 26 of 36 non-duplicative tasks identified by Ms. Terrill for a 72% task loss. If Ms. Terrill's tasks that required claimant to keep her head in an awkward or extreme position for an extended period of time were eliminated, Dr. Fluter opined claimant could not perform 21 of 36 non-duplicative tasks for a 58% task loss.

Dick Santner, a vocational rehabilitation consultant, evaluated claimant at respondent's request. His report indicated that following claimant's 2008 accident she was doing medication aide activities for respondent, but listed several other job activities, including:

- Assisting residents with upper body dressing.
- Working at the reception desk answering the phone, taking messages, directing calls and greeting visitors.
- Assisting residents with determining meal choices for lunch.
- Taking vital signs and charting.
- Passing out meal trays.
- Cleaning baseboards.

Mr. Santner identified 30 job tasks that claimant performed in the 15 years prior to her 2008 accident. Dr. Sandra D. Barrett opined claimant could no longer perform 7 of 30 job tasks for a 23% task loss. Among the seven tasks that claimant could no longer perform were: assisting residents with bathing, dressing and using the toilet, including transfers as necessary; assisting residents with meals, including pushing residents in wheelchairs to the dining area, assisting residents with ambulating and bringing trays; turning residents to avoid bedsores; and assisting residents with ambulating using a gait belt.

Neither Mr. Santner nor Ms. Terrill was asked to identify the job tasks claimant performed in her post-accident jobs with respondent. Nor were Drs. Fluter and Barrett asked to identify what, if any, of the job tasks claimant could still perform associated with her job in the front dining room.

The Review and Modification award states:

The Claimant is requesting a modification of the previous entered Award, pursuant to K.S.A. 44-528, which reads:

*"(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.*

*"(b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages*

*the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation."*

This particular paragraph specifically refers to modifications of an award; and therefore, this matter is not controlled by K.S.A. 44-510e(a).

. . . .

This Court finds that the Claimant is capable of earning the same or higher wages than she did at the time of her accident, and therefore her request for a modification of the previously entered award is denied.<sup>4</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-528 was set forth in the Review and Modification award and need not be repeated here. K.S.A. 44-510e(a), in pertinent part, states:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

---

<sup>4</sup> Review and Modification award at 3-4.

The interrelationship between K.S.A. 44-528 and 44-510e was discussed by the Kansas Court of Appeals in *Asay*,<sup>5</sup> when it stated: “The review and modification statute, K.S.A. 44-528, does not alter the test for determining compensable permanent partial general disability under K.S.A. 44-510e.”<sup>6</sup> The Kansas Supreme Court summarily affirmed the decision of the Kansas Court of Appeals in *Asay*.<sup>7</sup>

In *Serratos*,<sup>8</sup> the Kansas Court of Appeals addressed the issue of whether K.S.A. 44-528 first must be consulted in determining if a review and modification is appropriate. *Serratos* filed for review and modification based solely on the basis that he lost his job. The ALJ found and the Board affirmed that under K.S.A. 44-528 *Serratos* was not capable of earning the same or higher wages than the wages he was earning while working for Cessna as evidenced by an unsuccessful job search and, therefore, sustained a 100% wage loss and an increase in his permanent partial disability. The Kansas Court of Appeals in *Serratos* stated:

The Board found K.S.A. 44-510e controlled in this matter over the general language of K.S.A. 44-528 and reflected the legislature's most recent expression of its intent on how permanent partial general disability awards should be calculated. This is essentially correct if referring to subsection (b). K.S.A. 44-528(a) sets out the terms to modify a prior award according to the “limitations provided” in the Act. The only way to calculate a change in work disability is by referring to K.S.A. 44-510e(a). Following *Bergstrom*, the Board found *Serratos*' post-injury wage loss was 100%, and the reasons for *Serratos*' wage loss were irrelevant. The Board did not err in applying K.S.A. 44-510e(a) to find *Serratos*' work disability increased, and a modification was justified.

Cessna also argues K.S.A. 44-528 is a special statute because it is the sole statute in the Act addressing modification of prior awards. Accordingly, Cessna contends when a question arises regarding the appropriate standard to apply to review and modification proceedings, K.S.A. 44-528 should control. This argument is raised for the first time in Cessna's reply brief. See *Ortiz v. Biscanin*, 34 Kan. App. 2d 445, 467, 122 P.3d 365 (2004) (An argument asserted for the first time in a reply brief does not conform to Supreme Court Rule 6.05 [2010 Kan. Ct. R. Annot. 44] and will be disregarded.). Regardless, even if K.S.A. 44-528 is a special statute, Cessna ignores the language in subsection (a) that refers to other sections of the Act to determine whether an increase or decrease in work disability is warranted.

---

<sup>5</sup> *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421, *aff'd* 240 Kan. 52 (1986).

<sup>6</sup> *Id.* at 124-25.

<sup>7</sup> *Asay v. American Drywall*, 240 Kan. 52, 726 P.2d 1332 (1986).

<sup>8</sup> *Serratos v. Cessna Aircraft Company*, No. 104,106, 2011 WL 2637449 (Kansas Court of Appeals unpublished opinion filed July 1, 2011).

In summary, K.S.A. 44-528 provides a means for either the employer or employee to seek a modification of an award. Where the employee seeks a modification of work disability because of a subsequent wage loss, the work disability is calculated under K.S.A. 44-510e(a). In this case, Serratos' work disability increased because of a total wage loss. Under K.S.A. 44-528(a), the ALJ, and the Board on appeal, had the authority to modify the award "upon such terms as may be just" and "subject to the limitations" in the Act – K.S.A. 44-510e(a). Subsection (b) need not be considered under the circumstances.

The Board addressed this same issue in *Keovilay*.<sup>9</sup> Keovilay suffered low back and left leg injuries while working for respondent. The claim was settled in a running award, roughly based by splitting the opinions of two physicians on functional impairment. Keovilay's job was eliminated and she subsequently filed an application for review and modification. The ALJ determined Keovilay was entitled to a modification of her settlement and was entitled to a 62% work disability. The Board affirmed the ALJ's review and modification Award, citing *Serratos* and stating:

In *Serratos*, the Kansas Court of Appeals ruled that an employee may seek a review and modification when the only basis for the modification was job loss and resulting wage loss. K.S.A. 44-528 sets out the terms to modify a prior award. The Court in *Serratos* held the only way to calculate a work disability is by following K.S.A. 44-510e. The Court in *Serratos* concluded that the language of K.S.A. 44-510e controlled over the general language of K.S.A. 44-528. Here, as in *Serratos*, claimant sought a review and modification because she lost her job. In *Serratos*, claimant was discharged from his employment due to alleged misconduct not due to the injury. In the present claim, claimant was discharged because her job was eliminated by respondent, not as the result of misconduct or through her own fault. Either way, the reason for the wage loss is irrelevant. The Board finds that K.S.A. 44-528 permits claimant to seek a review and modification as claimant has suffered a job loss and resulting wage loss.

In the present claim, the ALJ considered the evidence as required by K.S.A. 44-528(a) and denied claimant's request for a modification of the award because claimant was capable of earning the same or higher wages than she did at the time of the accident. However, that is not the legal standard set forth in K.S.A. 44-528(a), which provides that the ALJ may modify an award if he or she finds that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished. Clearly, claimant's work disability has increased.

---

<sup>9</sup> *Keovilay v. Kaman Aerostructures n/k/a Plastic Fabricating Company, Inc.*, No. 1,046,547, 2012 WL 1652954 (Kan. WCAB Apr. 16, 2012).

The Board has de novo review and may consider all issues that were before the ALJ.<sup>10</sup> Once claimant quit her job with respondent, she had a work disability as defined by K.S.A. 44-510e. In *Bergstrom*,<sup>11</sup> the Kansas Supreme Court stated:

We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee “*is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.*” (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.

To adopt the ALJ’s ruling would be to impose different legal standards upon two different classes of injured workers. The first class of injured workers are those who after being injured, but prior to an award being entered in their claim, sustained a wage loss of more than 10% of their pre-injury wages. Those injured workers would receive an award for work disability according to the formula set forth in K.S.A. 44-510e. The second class of injured workers are those who returned to work for 90% or more of their pre-injury wages, received an award based upon a functional impairment and later lost their employment or became employed at less than 90% of their pre-injury wages. The latter class of workers might not be entitled to an award based on having a work disability solely because the ALJ determined the worker was capable of earning comparable wages. Therefore, the Board grants claimant’s request for a modification of her award. The next step is for the ALJ, utilizing K.S.A. 44-510e, to determine claimant’s work disability.

### CONCLUSION

The Board grants claimant’s request for a modification of the award and this matter is remanded to the ALJ for a determination of claimant’s work disability in accordance with K.S.A. 44-510e.

---

<sup>10</sup> *Borjas v. Optimus Corp.*, No. 1,029,233, 2007 WL 2296141 (Kan. WCAB July 31, 2007).

<sup>11</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 609-10, 214 P.3d 676 (2009).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board reverses the May 6, 2013, Review and Modification award denying claimant's request for a modification of the original award, and remands this matter to ALJ Clark for a determination of claimant's work disability in accordance with K.S.A. 44-510e.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2013.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Jonathan Voegeli, Attorney for Claimant  
jvoegeli@slapehoward.com

Michael L. Entz, Attorney for Respondent and its Insurance Carrier  
mike@entzlaw.com

Honorable John D. Clark, Administrative Law Judge

---

<sup>12</sup> K.S.A. 2012 Supp. 44-555c(k).